

No. PD-0257-21

**IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS**

FILED
COURT OF CRIMINAL APPEALS
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DEANA WILLIAMSON, CLERK

DANNA PRESLEY CYR,

Appellant,

v.

THE STATE OF TEXAS,

Appellee.

On the State of Texas's appeal
from Cause No. 11-19-00041-CR
in the Eleventh Court of Appeals at Eastland
as appealed from Cause No. 18-4835
in the 106th Judicial District Court of
Gaines County, Texas

BRIEF ON THE MERITS

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BRIEF ON THE MERITS

TO THE HONORABLE JUDGES OF THIS COURT:

NOW COMES Appellant, Danna Presley Cyr ("Ms. Cyr"), and in accordance with Texas Rules of Appellate Procedure 38.2 and 70.2 files this Brief on the Merits.

STATEMENT OF THE FACTS

It is undisputed that J.D., Ms. Cyr's four-month-old daughter, suffered life-threatening brain injuries prior to her arrival at the pediatric ICU at Covenant Women and Children's Hospital in Lubbock on June 30, 2013.¹ It is likewise undisputed that Justin Cyr, Ms. Cyr's husband and the child's father, caused these injuries by shaking J.D. violently or shaking her and causing her head to impact against a hard surface. The issue at trial was whether and to what extent, if any, Mr. Cyr played a role in the injuries.

At the hospital, Ms. Cyr reported to the CPS investigator that her husband had changed J.D.'s diaper after a difficult bowel movement, after which she became lethargic and her eyes rolled back in her head.² She was fine 20 minutes later.³ J.D. was fussy during the night, but Ms. Cyr did not report any more seizure-like symptoms.⁴ In the morning

¹ *R. III. 40, 42, 69-70; R. IV. 38-45, 47, 86, 88-89, 97.*

² *R. III. 42-43.*

³ *Id.*

⁴ *Id.*

around 11:00 a.m., J.D. started acting weird, screaming and throwing her arms around.⁵ They transported her to Covenant.⁶

Packy Kissick, the chief deputy for the Gaines County Sheriff's Department, questioned Mr. Cyr, who stated that J.D. became limp and started having body spasms after a hard bowel movement.⁷ He called his mother, who was a registered nurse, to seek advice, and she told him to give the child Tylenol and wait to see if she improved.⁸ Around 11:00 a.m. the next morning, J.D. again had a spasm, so he and Ms. Cyr drove the child to Covenant Hospital.⁹ Ms. Cyr told Kissick that J.D. went limp and pail around 9:00 p.m. on June 29, 2013.¹⁰ She wanted to take J.D. to the doctor, but Mr. Cyr insisted that they wait.¹¹ J.D. woke up several times during the night, and upon the recurrence of the condition from the night before, they took J.D. to the hospital the next morning.¹²

⁵ *Id.*

⁶ *Id.*

⁷ *R. III. 77-81, 83.*

⁸ *R. III. 81-82, 85, 182.*

⁹ *R. III. 84-85.*

¹⁰ *R. III. 87.*

¹¹ *Id.*

¹² *R. III. 102.*

Deborah Presley, Ms. Cyr's mother, received a phone call from Ms. Cyr to tell her that J.D. had a seizure and that they were on the way to the hospital.¹³ Later that day, Ms. Cyr explained that the night before, Mr. Cyr had changed J.D.'s diaper and that she had been constipated.¹⁴ Ms. Cyr was in the kitchen at the time.¹⁵ She went to the bedroom to get another diaper, and when she returned to the living room, J.D. was unconscious.¹⁶ Mr. Cyr's mother told them to give J.D. some Tylenol and watch her, which they did.¹⁷ J.D.'s condition improved, though she did not eat much.¹⁸

Presley had seen J.D. and Ms. Cyr, along with Ms. Cyr's other children, the previous night when they went to a Dairy Queen.¹⁹ Ms. Cyr told Presley that J.D. made a popping sound when Ms. Cyr picked her up.²⁰ Presley picked up J.D. and confirmed that there was a popping

¹³ *R. III. 157, 173-74.*

¹⁴ *R. III. 181.*

¹⁵ *Id.*

¹⁶ *R. III. 182.*

¹⁷ *R. III. 182-83.*

¹⁸ *Id.*

¹⁹ *R. III. 169.*

²⁰ *R. III. 169-70.*

sound coming from her, but the child did not seem to mind and only cried one time during the evening.²¹ Presley also knew that Ms. Cyr's children had been roughhousing on the bed a few weeks prior, causing J.D. to fall off the bed.²² Moreover, Presley saw J.D. about a week before the traumatic injuries, and she appeared to be fine.²³

After leaving the Dairy Queen, Presley took B.P., Ms. Cyr's oldest daughter with her to go on a trip to see a Texas Rangers game.²⁴ As a result, B.P. was not in the house when Mr. Cyr injured J.D.²⁵ She saw Mr. Cyr choke J.D. on prior occasions, however.²⁶ B.P. testified that her mother was in the bedroom when this happened.²⁷ E.P., Ms. Cyr's middle daughter, testified that she saw Mr. Cyr choke J.D. on the June 29, 2013.²⁸ She was standing in the doorway and could see him do it.²⁹ Ms.

²¹ *R. III. 170-72.*

²² *R. III. 186.*

²³ *Id.*

²⁴ *R. III. 149.*

²⁵ *Id.*

²⁶ *R. III. 142, 145-46.*

²⁷ *R. III. 147.*

²⁸ *R. III. 127, 134-35.*

²⁹ *Id.*

Cyr was in the kitchen when this happened, and she came into the living room and told Mr. Cyr to stop hurting J.D.³⁰ She then took J.D. to the bedroom and put her to bed.³¹

Curt Cockings, M.D., a pediatric ophthalmologist, examined J.D.'s eyes and saw considerable hemorrhaging in both eyes, which indicted to him that J.D. had been shaken severely.³² He believed that J.D. had been shaken nearly to death.³³ He did not think retinal hemorrhages like these could be caused by a short fall, being struck, or squeezing.³⁴ Patty Patterson, M.D., a child abuse pediatrician, testified that J.D. had subdural hematoma and brain swelling in addition to the retinal hemorrhages Dr. Cockings observed.³⁵ She believed that someone had either shaken J.D. or caused her head to impact against a hard surface.³⁶ She believed the forces were very violent.³⁷ She believed a child receiving

³⁰ *R. III. 129, 135.*

³¹ *R. III. 129.*

³² *R. IV. 43.*

³³ *Id.*

³⁴ *R. IV. 45, 47.*

³⁵ *R. III. 63-64.*

³⁶ *R. III. 86, 97.*

³⁷ *R. III. 88.*

injuries like those in this case would become symptomatic immediately.³⁸ However, a child might stop crying and then become irritable.³⁹ She acknowledged that the trauma inflicted would have been severe regardless of the timing of medical intervention, though she agreed that that the injuries possibly could have been lessened by immediate medical treatment.⁴⁰

Ms. Cyr built her entire defense around concurrent causation. Defense counsel questioned the venire extensively about the law of concurrent causation.⁴¹ He insisted that it was important that the jury not only understand the law but also be willing to apply it.⁴² In his opening statement, he argued that the jury would be able to consider causation.⁴³ During the trial, he developed the causation issue with each witness. Defense counsel objected to the charge because it did not instruct the jury on the law of concurrent causation.⁴⁴ The court overruled the

³⁸ *R. IV. 59.*

³⁹ *Id.*

⁴⁰ *R. IV. 96, 98-99.*

⁴¹ *R. II. 107-11.*

⁴² *R. II. 110-11.*

⁴³ *R. III. 16-23.*

⁴⁴ *R. IV. 120.*

objection and, as a result, pulled the rug out from under Ms. Cyr's defense.⁴⁵

⁴⁵ *R. IV. 121.*

SUMMARY OF THE ARGUMENT

Long-standing rules governing the submission of defensive issues are well suited to address situations in which concurrent causes are present. The State's proposed rules that would effectively erect a categorical bar to giving a concurrent cause instruction are unwarranted. The Court should reject the State's invitation to impose a rule restricting the authority of trial courts to apply existing law.

Moreover, the court of appeals properly determined that there was at least some evidence in the record that would demonstrate that her actions were clearly insufficient to cause J.D.'s serious injuries. The State's assertion that the evidence is equivocal or ambivalent is incorrect.

Finally, because existing rules are adequate to guide courts in determining when a concurrent causation instruction is needed and because the State has taken inconsistent positions in this case, the Court should exercise its authority and dismiss this case as improvidently granted.

ARGUMENT

- A. Existing rules governing jury instructions on defensive issues, when properly raised by the evidence, are sufficient to address cases involving concurrent causes.

The State conjures a problem where none exists. It seeks a categorical rule that a person charged with injury to a child by omission is not entitled to a charge on concurrent causation as a matter of law.⁴⁶ Not satisfied with the reach of its rule, the State asserts that the concurrent cause defense is categorically inapplicable to situations in which “two actors contribute to the result”⁴⁷ or when the injury is attributable “solely to the defendant.”⁴⁸

The State’s perceived dangers arising from the law relating to concurrent causation are, on close examination, imaginary. The well-

⁴⁶ State’s Brief on the Merits, at 14 (contending that court of appeals “failed to see that the doctrine is inapplicable as a matter of law when the charged offense by design makes the defendant culpable for the conduct of the alleged concurrent cause”); *id.* at 16 (asserting that in injury to a child case in which defendant exposes child to danger, “it can be no defense that it was not the defendant but the realized risk that caused the injury”); *id.* at 17 (asserting a contrary rule would be absurd and would swallow the offense whole).

⁴⁷ *Id.* at 13 (“From these cases (and experience), it becomes clear why concurrent causation is rarely an issue when there are two actors who contribute to the result—meeting one or both parts of the test is nearly impossible.”).

⁴⁸ *Id.* at 20 (“There is no place for concurrent cause when the analysis hinges on the existence of injury attributable solely to the defendant.”).

established law relating to jury instructions on defensive issues is more than adequate to guard against the so-called abuses the State seeks to curtail. Because the court of appeals applied the proper legal standards, this appeal presents nothing that should interest this Court. More importantly, because the court of appeals applied those standards correctly, its decision should withstand scrutiny.

1. Section 6.04 places a limitation on the outer reaches of criminal causation, and a defensive issue may arise in proper circumstances.

The target of the State's apprehensions is the last clause of § 6.04 of the Texas Penal Code.⁴⁹ In order to prove criminal responsibility, the State must establish a "but for" causal connection between the defendant's conduct and the resulting harm.⁵⁰ The statute expands the concept of causation beyond the defendant's conduct standing alone and allows the State to establish criminally responsibility for conduct even

⁴⁹ Section 6.04(a) provides:

A person is criminally responsible if the result would not have occurred but for his conduct, operating either alone or concurrently with another cause, unless the concurrent cause was clearly sufficient to produce the result and the conduct of the actor clearly insufficient.

TEX. PENAL CODE § 6.04(a).

⁵⁰ *Bell v. State*, 169 S.W.3d 384, 395 (Tex. App.—Fort Worth 2005, pet. ref'd).

when other sources are involved in causing a result.⁵¹ By its terms, it does not distinguish between human actors and other sources of potential causation; rather, it clearly allows the State to prove causation, and thus secure a conviction, even when other causes are present in addition to whatever the defendant did to bring about the result. “If concurrent causes are present, two possible conditions exist to satisfy the “but for” requirement: (1) the defendant’s conduct may be sufficient by itself to have caused the harm, regardless of the existence of a concurrent cause; or (2) the defendant’s conduct and the other cause *together* may be sufficient to have caused the harm.”⁵²

Whether this structure is “anti-defensive”⁵³ by defining causation expansively, the last clause of the section clearly places a limit on causation that can be used defensively, as it often is.⁵⁴ By its terms, a “defendant cannot be convicted if the additional cause, other than the

⁵¹ *Fountain v. State*, 401 S.W.3d 344, 358 (Tex. App.—Houston [14th Dist.] 2013, pet. ref’d).

⁵² *Id.* at 359 (emphasis in original) (quoting *Robbins v. State*, 717 S.W.2d 348, 351 (Tex. Crim. App. 1986)).

⁵³ State’s Brief on the Merits, at 9.

⁵⁴ *Remsburg v. State*, 219 S.W.3d 541, 545 (Tex. App.—Texarkana 2007, pet. ref’d) (noting the last clause in § 6.04 favors the defense).

defendant's conduct, is clearly sufficient by itself to produce the result, and the defendant's conduct by itself is clearly insufficient to produce the result.”⁵⁵ This clause focuses on the relative significance of the defendant's conduct as compared to the other causes of a result and limits criminal culpability when the defendant's contribution is comparably weak or insignificant.

Because causation depends on the resolution of myriad factual issues related to “what actually happened” in a given event, the “existence or nonexistence of a causal connection is a question for the jury's determination.”⁵⁶ In *Westbrook*, the Dallas Court of Appeals, noting the difficulty in parsing the relative strengths or weaknesses of concurrent causes, held that such matters are best left to the jury:

Section 6.04 provides no standard, and we have found none, that would help determine when the conduct of a party, but for which the result in question would not have occurred, is “clearly sufficient” or “clearly insufficient” to produce the result. The practice commentary in the annotated statutes suggests that this language is used to “free the [penal] law from encrusted precedents on ‘proximate causation,’ offering a principle that will permit both courts and juries to begin afresh in facing problems of this kind.” Being freed from “encrusted precedents,” we are left without authoritative guidance. We conclude that causation, being a concept too

⁵⁵ *Bell*, 169 S.W.3d at 395. See also *Fountain*, 401 S.W.3d at 359.

⁵⁶ *Wright v. State*, 494 S.W.3d at 361. See also *Fountain*, 401 S.W.3d at 358.

difficult for lawyers or even philosophers, is best left to a jury.⁵⁷

The trial court, nevertheless, still acts as a gatekeeper and must determine whether there is some evidence in the record for submission of the defensive issue to the jury. The rules governing the submission of a defensive issue in the charge are well-known and easily applied by courts in this State.⁵⁸ No special additional rules are needed when the defense relates to causation.

⁵⁷ *Westbrook v. State*, 697 S.W.2d 791, 793 (Tex. App.—Dallas 1985, pet. ref'd).

⁵⁸ A defendant is entitled to an instruction on any properly requested defensive issue raised by the evidence, regardless of whether the evidence is weak or strong, unimpeached or contradicted, credible or not credible, and regardless of whatever the trial court's opinion may be about the credibility or overall strength of the defense. *Granger v. State*, 3 S.W.3d 36, 38 (Tex. Crim. App. 1999); *Warren v. State*, 565 S.W.2d 931, 933-34 (Tex. Crim. App. 1978). "This rule is designed to insure that the jury, not the trial court, will decide the relative credibility of the evidence." *VanBrackle v. State*, 179 S.W.3d 708, 712 (Tex. App.—Austin 2005, no pet.). Evidence from *any source* may raise the defense, including evidence presented by the State, and the defendant need not even testify in order to raise the defense. *Smith v. State*, 676 S.W.2d 584, 585-87 (Tex. Crim. App. 1984) (holding that evidence raising defense may be presented by the defense or the State and the defendant does not have to testify in order to provide evidence of reasonable apprehension or of his state of mind); *VanBrackle*, 179 S.W.3d at 712. "In summary, if a defensive theory is raised, and the trial court is timely and properly requested to instruct the jury on that theory, the trial court *must* instruct the jury on the raised defensive theory." *Booth v. State*, 679 S.W.2d 498, 500 (Tex. Crim. App. 1984) (emphasis added). A reviewing court, in determining whether evidence supports submission of the defense to the jury, must view the evidence in the light most favorable to the defense. *See Guilbeau v. State*, 193 S.W.3d 156, 159 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd); *VanBrackle*, 179 S.W.3d at 713.

2. The State's categorical exclusion of the concurrent causation defense in injury to a child by omission cases is unwarranted.

The State posits that the concept of concurrent causation under § 6.04 does not apply, as a matter of law, to the results of other actors when the defendant is “criminally responsible” for the actions of those actors.⁵⁹ The State attempts to draw an equivalence between reckless injury to a child by omission and parties liability. However, on closer examination, the comparison falls apart.

Under § 7.02 of the Texas Penal Code, a person may be criminally responsible for the conduct of another if that person, “acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense.”⁶⁰ “In general, an instruction on the law of the parties may be given to the jury whenever there is sufficient evidence to support a jury verdict that the defendant is criminally responsible under the law of parties.”⁶¹ The

⁵⁹ State's Brief on the Merits, at 2, 14-18.

⁶⁰ TEX. PENAL CODE § 7.02(a)(2).

⁶¹ *Ladd v. State*, 3 S.W.3d 547, 564 (Tex. Crim. App. 1999).

upshot of parties liability is that the conduct of the party actor becomes the conduct of the defendant.⁶²

Under § 22.04, a person commits the offense of injury to a child if that person “recklessly by omission, causes to a child . . . serious bodily injury [or] serious mental deficiency, impairment, or injury.”⁶³ An omission is conduct constituting an offense if “the actor has a legal or statutory duty to act.”⁶⁴ The Texas Family Code imposes a duty on parents to protect their children.⁶⁵ However, the fact that a parent may have a duty to protect a child from an abusive actor does not mean that the parent is criminally responsible for the actions of that person in the same manner in which parties liability works. In other words, the abusive person’s actions do not become the actions of the parent who fails to protect the child. Otherwise, the parent could be prosecuted for intentional and knowing injury to a child, rather than reckless injury by omission.⁶⁶

⁶² *Johnson v. State*, 560 S.W.3d 224, 229-30 (Tex. Crim. App. 2018) (“The law of parties authorizes conviction for the collective conduct of two or more people.”).

⁶³ TEX. PENAL CODE § 22.04(a).

⁶⁴ *Id.* at § 22.04(b).

⁶⁵ TEX. FAM. CODE § 151.001(a)(2).

⁶⁶ TEX. PENAL CODE § 22.04(a)(1) & (e).

The difference matters for a more fundamental reason. When law of parties applies, culpability is shared by all the parties, regardless of what they actually do. As a result, the actions of the individual parties are not independent causes contributing to a criminal outcome. This is not the case with injury to a child by omission. The abusive party's actions, which cause injury to a child, are independent of the inaction of the parent who has a duty to act. The court in *Wright* correctly recognized as much.⁶⁷ The presence of two independent causes in an injury to a child case leads to two questions, the answers to which are potentially relevant to whether one cause is clearly sufficient and another cause is clearly insufficient to have caused a result. First, what did the abusive actor do? Second, what could the parent have done in response? The fact that evidence in a case might support a finding that a parent is relatively powerless in light of all the exigent circumstances is not absurd, and recognition that the concurrent causation defense might be available in such circumstances would not "swallow the offense whole."⁶⁸ Rather, courts applying rules already available to them may sift through the

⁶⁷ *Wright v. State*, 494 S.W.3d at 362 (stating that the State's case was one involving concurrent causes).

⁶⁸ State's Brief on the Merits, at 17.

constellation of potential factual scenarios and give a concurrent causation instruction when the evidence warrants it.

This is a case in point.⁶⁹ What could Ms. Cyr have done differently? When the evidence is viewed in the light most favorable to giving the concurrent cause instruction, the answer is not much. It is evident that Mr. Cyr's actions were a substantial cause of the child's brain injuries. Ms. Cyr had little opportunity or power to alter this. Ms. Cyr was not present when Mr. Cyr violently shook J.D. She was either in the kitchen cooking or in the bedroom fetching a diaper. She heard J.D. cry, and she told Mr. Cyr to stop hurting her. Mr. Cyr told her that the child had a hard bowel movement, and Ms. Cyr went to the bedroom to get a diaper. When she returned, J.D. was lethargic and exhibited seizure-like symptoms. Though Ms. Cyr wanted to take J.D. to the doctor then, Mr. Cyr instead called his sister, who was a nurse, for advice. Based on this,

⁶⁹ It should be noted that Ms. Cyr was not tried as a party to Mr. Cyr's offense. There was no evidence that Ms. Cyr solicited, encouraged, directed, aided, or attempted to aid Mr. Cyr when he injured J.D. The trial court included an instruction on parties liability in the abstract portion of the charge; however, it did not apply the concepts in the application paragraph. The court of appeals held that the presence of the parties instruction, under these circumstances, contributed to the harm arising from the trial court error in failing to instruct on the defense of concurrent causation. *Cyr v. State*, 630 S.W.3d 380, 388 (Tex. App.—Eastland 2021, pet. granted).

they gave J.D. some Tylenol, and she improved after about 20 minutes. Ms. Cyr put J.D. to bed.

Moreover, the evidence when viewed in the light most favorable to the defense reveals that Ms. Cyr had little notice that Mr. Cyr would lash out with the level of violence required to cause these injuries. Ms. Cyr's older children saw Mr. Cyr be abusive to J.D., but both testified that this happened when Ms. Cyr was not present. Presley likewise saw J.D. a week before the incident and the night before, and she did not see anything about J.D. that caused her concern.

Contrary to the State's assertions, *Barnette* is distinguishable from this case. In *Barnette*, this Court held that the trial court did not err in refusing a concurrent cause instruction.⁷⁰ The defendant was charged with reckless injury to a child by placing the child in a tub of lukewarm water while ignoring the risk that the child might turn on the hot water.⁷¹ The defense asked for an instruction under § 6.04 that would allow the jury to acquit if it found that the defendant's actions of putting the child in a tub full of lukewarm water was clearly insufficient to cause the

⁷⁰ *Barnette v. State*, 709 S.W.2d 650, 650-51 (Tex. Crim. App. 1986).

⁷¹ *Id.* at 650.

injuries and that the child's actions in turning on the hot water was clearly sufficient.⁷² This Court held that it was not error "for the trial court to refuse to instruct the jury to find appellant not guilty if they found to be true facts that would prove her guilty of injury to a child."⁷³ Unlike in this case, however, the defendant in *Barnette* exercised considerable control over the entire situation. She could have prevented the injuries simply by not leaving the child unattended. Thus, there was no evidence that what made her culpable was clearly insufficient as a causal nexus. From this standpoint, *Barnette* is another straightforward application of the rules governing defensive instructions, and it does not support a rule that concurrent causation can never be applied in omission cases.

3. The State's proposed limitations on the concurrent causation defense in other situations is likewise unwarranted.

The State asserts that a charge on concurrent causation should almost never be given when the source of the causes arises from multiple

⁷² *Id.* at 650-51.

⁷³ *Id.* at 651. The act that was criminalized in *Barnette* was not placing the child in a tub of lukewarm water, but rather leaving the child unattended in a tub a lukewarm water. As a result, the defendant's requested instruction was flawed.

actors.⁷⁴ There is nothing peculiar about the source of causation—whether it be from a human agency or otherwise—that affects application of the concurrent causation defense. A different rule is not required when a concurrent cause arises from a third-party, and courts can address individual situations with the well-established rules governing defensive instructions. Courts in this State have exhibited no difficulty in doing just that.

For instance, in *Saenz v. State*, the defendant was charged with intoxication manslaughter after her vehicle collided with a pedestrian.⁷⁵ The defendant had a blood alcohol level of .172.⁷⁶ However, there was no evidence that she had been speeding or that she had strayed from her lane or left the roadway.⁷⁷ There was evidence, on the other hand, that the deceased had been wearing dark clothes, was walking in the roadway at night, and may have been distracted while talking on his phone; that the road had a narrow shoulder restricting pedestrian access; and that any driver, whether sober or not, would have difficulty seeing a dimly-

⁷⁴ State’s Brief on the Merits, at 11-13.

⁷⁵ 474 S.W.3d 47, 50 (Tex. App.—Houston [14th Dist.] 2015, no pet.).

⁷⁶ *Id.*

⁷⁷ *Id.* at 52.

clad pedestrian under these circumstances.⁷⁸ Applying the standard in § 6.04, the court found, under these particular facts and circumstances, that there was at least some evidence that the defendant's intoxication was clearly insufficient to cause the deceased's death and some evidence that the deceased's actions in walking on the roadway, was clearly sufficient.⁷⁹

In *Remsburg v. State*, an aggravated assault of a law enforcement officer case, the court noted that the actions of both the defendant and the officer, who was trying to remove him from a car, constituted concurrent causes under § 6.04.⁸⁰ The court, however, found that the defendant's action of putting the car into gear while the officer was

⁷⁸ *Id.*

⁷⁹ *Id.* Other courts have likewise applied § 6.04 in similar situations involving intoxication manslaughter. *See Nugent v. State*, 749 S.W.2d 595, 598 (Tex. App.—1988, no pet.) (holding that it was error not to apply concurrent causation in case where the deceased swerved into the defendant's lane just prior to the collision); *Westbrook v. State*, 697 S.W.2d at 793 (rejecting defendant's request for a charge requiring acquittal if the jury found the deceased made an improper lane change but recognizing that the deceased's actions supported defense of concurrent causation). Importantly, the courts looked at all the facts and circumstances set out in the evidentiary record to determine whether there was some evidence raising the issue.

⁸⁰ 219 S.W.3d 541, 545 (Tex. App.—Texarkana 2007, pet. ref'd).

leaning into the interior was not clearly insufficient to cause the injuries to the officer.⁸¹

In *Griffin Industries, Inc. v. State of Texas*, the court found the actions of the defendant company's employees, in spilling chicken waste into a waterway, to be a concurrent cause of the spill with the actions of the company that loaded the truck.⁸² The court applied § 6.04 and found that a concurrent causation instruction was not warranted because there was no evidence that the defendant company's actions were clearly insufficient to cause the waste to pollute the water system.⁸³

In *Wright v. State*, a case in which the State charged the defendant with reckless injury to a child by omission, the court found concurrent causes as contemplated by § 6.04.⁸⁴ The defendant's boyfriend caused the initial injuries to the defendant's child by sexually assaulting her.⁸⁵ The

⁸¹ *Id.*

⁸² 171 S.W.3d 414, 421 (Tex. App.—Corpus Christi 2005, pet. ref'd).

⁸³ *Id.*

⁸⁴ 494 S.W.3d 352, 362 (Tex. App.—Eastland 2015, pet. ref'd).

⁸⁵ *Id.*

defendant's response, in failing to seek immediate medical care, was a second, concurrent, cause.⁸⁶

The State points to two cases to support its contention that a concurrent causation defense is virtually impossible when multiple actors are involved.⁸⁷ However, neither *Fish* nor *Bell* stand for this proposition; rather, they are run-of-the-mill applications of § 6.04 and the rules governing defensive instructions. The courts in those cases viewed all of the particular facts and circumstances in those cases and determined that concurrent causation had not been raised by the evidence.⁸⁸

The point here is that the well-established rules governing whether a defensive instruction is warranted under the facts and circumstances

⁸⁶ *Id.* Though discussing the application of § 6.04, the court did not address the concurrent cause defense because it found insufficient evidence that the defendant caused serious bodily injury beyond that inflicted by her boyfriend by not seeking medical attention sooner. *Id.* at 363-64.

⁸⁷ State's Brief on the Merits, at 12-13 (discussing *Fish v. State*, 609 S.W.3d 170 (Tex. App.—Houston [14th Dist.] 2020, pet. ref'd), and *Bell v. State*, 169 S.W.3d 384 (Tex. App.—Fort Worth 2005, pet. ref'd)).

⁸⁸ *Fish*, 609 S.W.3d 185-86 (finding that the deceased action of taking two steps towards the defendant's vehicle was sufficient by itself to have caused her death); *Bell*, 169 S.W.3d at 395 (finding that there was no evidence that a car passenger's action in opening door was clearly sufficient, standing alone, to cause death).

of a particular case are sufficient and that a different rule, as suggested by the State, is unnecessary.

The State also apparently asserts that concurrent causation categorically cannot be applied when the existence of an injury is solely attributable to the defendant.⁸⁹ In finding that Ms. Cyr was entitled to a concurrent causation instruction, the court of appeals applied a rule that in failure to seek medical care cases, the State must prove that the parent's failure itself caused serious bodily injury beyond the injury giving rise to the need for medical care.⁹⁰ However, the State's contention proves too much. The fact that additional serious bodily injury must be attributable to the failure to seek medical care does not mean that the person who inflicted the injuries ceases being responsible for the injuries or that the person who fails to seek medical care is solely responsible for the added harm. The issue of concurrent causation persists, and entitlement to a charge under proper circumstances should not be

⁸⁹ State's Brief on the Merits, at 19-20.

⁹⁰ *Cyr v. State*, 630 S.W.3d 380, 386-87 (Tex. App.—Eastland, pet. granted) (citing *Wright v. State*, 494 S.W.3d 352, 363 (Tex. App.—Eastland, pet. ref'd), and *Payton v. State*, 106 S.W.3d 326, 327-28 (Tex. App.—Fort Worth 2003, pet. ref'd).

categorically precluded just because additional harm is required for a conviction.

This Court should reject the State's invitation to declare that the concurrent causation defense is inapplicable as a matter of law to the broad categories of potential cases identified by the State. Rather, courts of this state should continue to evaluate individual cases based on all the facts and circumstances involved to determine whether a defensive instruction is warranted. Courts have exhibited consistent aptitude in applying these well-established rules, and there is no reason to believe they will do otherwise when the defense relates to concurrent causation.

B. The court of appeals properly applied the rules governing jury charges on defensive issues.

In its second issue, the State asserts that even if concurrent causation applies to this case, the record should contain affirmative evidence that Ms. Cyr's conduct could not have inflicted serious bodily injury.⁹¹ Because the State believed the evidence in the record was at best ambivalent whether Ms. Cyr's conduct was clearly insufficient to cause serious bodily injury, a concurrent causation was unnecessary.⁹²

⁹¹ State's Brief on the Merits, at 2, 21.

⁹² *Id.* at 2.

The court of appeals correctly decided this issue. This Court should affirm its holding.

1. The Eastland Court’s decision.

The court of appeals held that “[i]n the instant case, there was clearly some evidence that Justin’s actions, by themselves, were sufficient to have caused J.D.’ injuries. Therefore, whether Appellant was entitled to a jury instruction on concurrent causes depends on whether there was some evidence that Appellant’s conduct was clearly insufficient to cause J.D.’s injuries.”⁹³ The court relied on its opinion in *Wright*. In that case, the court held that it is not sufficient for the State to prove that the defendant failed to provide medical treatment for a serious bodily injury.⁹⁴ Rather, it is necessary for the State to prove that the child suffered serious bodily injury because the defendant failed to provide medical treatment.⁹⁵ Viewing the evidence in the light most favorable to the defense submission, the court held that “the record contains some evidence that Appellant’s conduct was clearly insufficient to result in

⁹³ *Cyr v. State*, 630 S.W.3d at 387.

⁹⁴ *Wright v. State*, 494 S.W.3d at 364.

⁹⁵ *Id.* (citing *Payton v. State*, 106 S.W.3d at 329; *Dusek v. State*, 978 S.W.2d 129, 133 (Tex. App.—Austin 1998, pet. ref’d)).

serious bodily injury or serious mental deficiency, impairment, or injury to J.D.”⁹⁶

2. The evidence supported giving the charge.

The State misconstrues the evidence concerning the nature of J.D.’s injuries. J.D. presented at the hospital with the triad of conditions typical of shaken baby syndrome—subdural hematoma, retinal hemorrhaging, and swelling in the brain.⁹⁷ Dr. Cockings testified that J.D. had been shaken almost to death.⁹⁸ Dr. Patterson agreed that the injuries were consistent with a shaking event, but she also believed that it might have been combined with an impact of some sort.⁹⁹ As a result of these events, J.D. had severe brain damage.¹⁰⁰ Dr. Patterson testified that lack of oxygen caused by the brain swelling contributed to the brain damage.¹⁰¹

When asked whether the swelling and brain trauma could have been lessened had J.D. received earlier medical treatment, Dr.

⁹⁶ *Cyr*, 630 S.W.3d at 387.

⁹⁷ *R. IV. 75-76.*

⁹⁸ *R. IV. 43.*

⁹⁹ *R. IV. 86, 88-89, 96-99.*

¹⁰⁰ *R. IV. 72-73.*

¹⁰¹ *R. IV. 90.*

Patterson's reply was that it was possible.¹⁰² She agreed, however, even in light of this possibility, the injuries inflicted on J.D. by shaking and impact caused serious bodily injury.¹⁰³ She then responded to the following questions:

Q. If they had got there any earlier, would she not have serious bodily injury in your opinion?

A. No. I believe she would still have very serious injury.

Q. Serious mental deficiency?

A. Yes.

Q. Still near death?

A. Most likely, yes.¹⁰⁴

She reiterated that it was possible that earlier treatment might have mitigated the injuries.¹⁰⁵

Though J.D. manifested seizure-like symptoms after sustaining the injuries, Ms. Cyr followed her mother-in-law's advice to give the child some Tylenol and observe her for a period of time. Ms. Cyr reported that J.D. got better, and she put her to bed. Though she was fussy through the night, Ms. Cyr did not report seeing any further seizure-like symptoms.

¹⁰² *R. IV. 91.*

¹⁰³ *R. IV. 96.*

¹⁰⁴ *R. IV. 98.*

¹⁰⁵ *R. IV. 99.*

The next morning around 11:00 a.m., J.D. again started having seizures, and she and Mr. Cyr drove her to the hospital in Lubbock. Moreover, staff from local hospitals testified that they had limited facilities or capability to treat trauma such as this.¹⁰⁶ The most any could do was stabilize the child and then transport her to Lubbock.¹⁰⁷

There is ample evidence in the record that would permit a jury to determine that Ms. Cyr's delay in seeking medical attention was clearly insufficient to cause serious bodily injury to J.D. and determine that Mr. Cyr was essentially the overwhelming and primary cause of J.D.'s injuries.

Moreover, the State's attempt to parse out categories of injuries—brain trauma, damage to the eyes, and mental deficiency—is unavailing.¹⁰⁸ Both Drs. Cocking and Patterson testified that the subdural hematoma, retinal hemorrhaging, and swelling of the brain were caused by a severe shaking event that exerted tremendous forces on J.D.

¹⁰⁶ *R. IV. 106, 110, 114-15.*

¹⁰⁷ *Id.*

¹⁰⁸ State's Brief on the Merits, at 21-23.

C. This Court should dismiss this case as improvidently granted.

The State's premise for seeking this Court's review—that concurrent causation under § 6.04 does not apply in situations in which the defendant is criminally responsible for the results caused by third parties—is flawed and inapplicable to the case at hand. The State fashions a false equivalence between the law of parties and reckless injury to a child by omission. However, it is clear that § 22.04 does not make a defendant criminally responsible for the actions of another actor in such a manner that the latter's actions must be imputed to the defendant. Because the State's argument breaks down, it is clear that the standard legal principals governing jury instructions on defensive issues are adequate to address concurrent causation in not only injury to a child by omission cases, but in any of the other cases identified by the State. No particular construction of § 6.04 is necessary.

Moreover, prior to filing its PDR, the State, through its elected district attorney, filed a motion for rehearing in the court of appeals in

which it conceded charge error.¹⁰⁹ It is apparent that the State is now taking an inconsistent position in this Court.

For these reasons, this Court should dismiss this case as improvidently granted.¹¹⁰

WHEREFORE, PREMISES CONSIDERED, Appellant, Danna Presley Cyr, respectfully requests that this Court dismiss the State Prosecuting Attorney's petition for discretionary review as improvidently granted or, alternatively, that it affirm the lower court's judgment reversing Ms. Cyr's conviction and sentence and remanding the case to the trial court for a new trial. Ms. Cyr also requests that the Court grant her any and all other relief to which she may be entitled.

¹⁰⁹ State's Motion for Rehearing, at 1 ("The State agrees that an instruction pursuant to Texas Penal Code § 6.04 should have been given.").

¹¹⁰ TEX. R. APP. P. 69.3.

Respectfully submitted,

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I certify that on December 30, 2021, I served a true and correct copy of Brief on the Merits on counsel for the State Prosecuting Attorney, John Messinger, via EFile.

/s/ Paul E. Mansur

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